

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BYRON HENDERSON,	§
	§ No. 335, 2021
Defendant Below,	§
Appellant,	§ Court Below—Superior Court
	§ of the State of Delaware
v.	§
	§ Cr. ID No. 1901003580 (N)
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: January 10, 2022
Decided: February 15, 2022

Before **SEITZ**, Chief Justice; **VALIHURA** and **TRAYNOR**, Justices.

ORDER

Upon consideration of the appellant’s opening brief, the appellee’s motion to affirm, and the record below, it appears to the Court that:

(1) Byron Henderson filed this appeal from a Superior Court order sentencing him for a violation of probation (“VOP”). The State has moved to affirm the judgment below on the ground that it is manifest on the face of Henderson’s opening brief that the appeal is without merit. We agree and affirm.

(2) On November 4, 2019, Henderson pleaded guilty to second-degree robbery. The Superior Court sentenced him to five years of imprisonment, suspended for one year of Level III probation, with probation permitted to be flowed down to Level II after six months.

(3) In October 2020, the Superior Court found Henderson in violation of probation and imposed a VOP sentence. Henderson did not appeal.

(4) On September 8, 2021, a probation officer filed an administrative warrant. The administrative warrant alleged that Henderson was in violation of probation because he had been charged with new criminal offenses, including harassment, terroristic threatening, stalking, and third-degree criminal trespass. At a VOP hearing on September 28, 2021, the Superior Court found Henderson in violation of probation and sentenced him to five years of imprisonment, with credit for two days previously served, suspended after nine months for twelve months of Level III supervision with GPS monitoring.

(5) Henderson has appealed from his VOP sentence. On appeal, he appears to argue that he could not be found to be in violation of probation for incurring new criminal charges before he is convicted of the new charges. The record before the Court on appeal does not reflect on what basis the Superior Court found Henderson to be in violation of probation.¹ But the administrative warrant asserted the VOP based on new criminal charges, and Henderson concedes that he has pending criminal charges. We therefore find no merit to Henderson's appeal. The Superior

¹ See *Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987) (stating that the appellant has the burden to produce such portions of the transcript as are necessary to give this Court a fair and accurate account of the context in which the claim of error occurred and all evidence relevant to the challenged finding or conclusion (internal quotations omitted)).

Court has the authority to revoke probation and to impose a VOP sentence on the basis that a probationer has been charged with new criminal conduct, regardless of whether the new charges have yet been adjudicated.²

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED and the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice

² See *Wood v. State*, 2012 WL 3656404 (Del. Aug. 24, 2012) (“There is no merit to Wood’s claim that he could not be found guilty of a VOP on the basis of new and unproven criminal charges. Delaware law provides that the Superior Court has the authority to revoke probation on the basis that a probationer has been charged with new criminal conduct.”); *Cruz v. State*, 990 A.2d 409 (Del. 2010) (affirming VOP that was based on probationer’s incurring new criminal charges of which defendant had been acquitted before VOP was imposed). See also *Kurzmann v. State*, 903 A.2d 702, 717 (Del. 2006) (“The State can proceed against a probationer by filing a VOP petition alleging a new criminal offense, even if the State concedes that it does not have enough evidence to prosecute the probationer and to establish beyond a reasonable doubt that he has committed the underlying criminal offense.”).